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IN THE

Supreme Court of the United States

October Term, 1967

No. 1161

VALLECITO WATER COMPANY,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

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WESTERN PRINTING COMPANY, WHITTIER—OXBOW 8-1722

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

Petitioner prays that a writ of certiorari issue to review the judgment of the California Supreme Court entered in the above-entitled case on December 13, 1967.

CITATIONS TO OPINIONS BELOW

The memorandum order of the California Supreme Court denying the petition for a writ of review is unreported and is printed in Appendix A hereto, *infra.* The Interim Opinion of the Public Utilities Commission is printed in Appendix B hereto, *infra.*

JURISDICTION

The Interim Opinion of the Public Utilities Commission was entered on December 30, 1966. A timely petition for rehearing was filed, and the petition for rehearing was denied on May 2, 1967. A timely Petition for Writ of Review was filed in the California Supreme Court, and was denied by that court on December 13, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). The federal question sought to be presented here was raised at the first available instance before the Public Utilities Commission Petition for Rehearing, at p. 2, and before the California Supreme Court (Petition for Writ of Review and Points and Authorities in Support Thereof, at pp. 25-29).

QUESTION PRESENTED

Whether a state regulatory agency may, consistent with the requirements of due process of law, order a public utility to cancel approximately $300,000 worth of stock issued to one of its shareholders where that order rests on conclusion of adjudicatory fact and law made in a hearing to which the shareholder was not a party.

STATUTES INVOLVED

Calif. Pub. Util. Code § 852:

"No public utility shall purchase or acquire, take or hold, any part of the capital stock of any other public utility, organized or existing under or by virtue of the laws of this State, without having been first authorized to do so by the Commission. Every assignment, transfer, contract, or agreement for assignment or transfer of any stock by or through any person or corporation to any corporation or otherwise in violation of any of the provisions of this article is void and of no effect, and no such transfer shall be made on the books of any public utility."

Calif. Pub. Util. Code § 1759:

"No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or anunal any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, except that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases."

Calif. Corp. Code § 2470(b)(1):

"(b) The right to rescind the transfer of a certificate and reclaim the possession thereof does not exist in either of the following cases:

(1) If the certificate has been transferred to a purhaser for value, in good faith, without notice of any facts making the transfer wrongful."

STATEMENT

This petition seeks review of an order of the California Public Utilities Commission requiring Petitioner, a regulated public utility, to cancel 18,003 of its shares held by one William J. Hickey which he had purchased for approximately $300,000. Petitioner claims that this order is violative of the Due Process Clause of the Fourteenth Amendment in the most fundamental sense: the order commands the taking of Mr. Hickey's property without any hearing whatsoever, for he was not a party to the proceedings out of which the order compelling the cancellation resulted.

Petitioner is a public utility engaged in furnishing water service in Southern California. In 1963, two water companies vied for the right to acquire Petitioner's assets, either through the purchase of all of its stock or directly through the purchase of its assets. These companies—San Gabriel Water Company and Suburban Water Systems—applied for Commission approval of their proposed acquisitions. This approval was necessary as Section 852 of the Public Utilities Code forbids a public utility from acquiring the stock of another except with the consent of the Commission. Section 852 provides:

> "No public utility shall purchase or acquire, take or hold, any part of the capital stock of any other public utility, organized or existing under or by virtue of the laws of this State, without having been first authorized to do so by the commission. Every assignment, transfer, contract, or agreement for assignment or transfer of any stock by or through any person or corporation to any corporation or otherwise in violation of any of the provisions of this article is void and of no effect, and no such transfer shall be made on the books of any public utility."

During this period, a number of shares of Petitioner's stock were acquired by Calfin Co., a wholly-owned subsidiary of Suburban. The Commission found that Calfin was the alter ego of Suburban and, thus, that the securities were purchased by Calfin in violation of Section 852 of the Public Utilities Code of California. Decision No. 67261 (62 Calif. P.U.C. 699 (1964)).

Shortly thereafter, Suburban filed an application to acquire the stock in Petitioner which had been purchased by Calfin in violation of Section 852 and therefore "void." Before the Commission had acted on this application, on November 4, 1964, 18,003 shares of Petitioner's stock were sold by Calfin to one William J. Hickey.

The Commission thereupon, on December 15, 1964, commenced proceedings for the purpose of exploring *inter alia* the acquisition by Mr. Hickey of stock in Pe-

titioner from Calfin. (A copy of this Order Instituting Investigation is attached hereto as Appendix C). Hickey's position has been and remains that he was a bona fide purchaser, unaware of these various Commission proceedings and the contention that the stock held by Calfin and sold to him was "void." He maintains that under California law he is, as a bona fide purchaser, protected by application of Section 2470(b)(1) of the California Corporations Code, which at the time of the transfer provided:

> "(b) The right to rescind the transfer of a certificate and reclaim the possession thereof does not exist in either of the folowing cases:
>
> (1) If the certificate has been transferred to a purhaser for value, in good faith, without notice of any facts making the transfer wrongful."

The Commission held hearings and finally concluded that Hickey was not a bona fide purchaser; accordingly, it ordered Petitioner to cancel the stock now held by Mr. Hickey. It is this order of which Petitioner now complains because, as is hereafter shown, Mr. Hickey *was not a party to the Commission's proceedings.* The following narrative shows the course of the proceedings before the Commission and demonstrates clearly that Mr. Hickey was not before the Commission when it concluded that his stock must be cancelled.

The Commission's Order Instituting Investigation (Appendix C) named as parties respondent several water companies, two banks, and several individuals, one of whom was Mr. Hickey. At this point, it appeared that the Commission intended to make Mr. Hickey a party. However, Hickey (as well as other individuals who had been named as respondents by the Commission's Order of December 15, 1964) appeared by counsel before the Commission on August 31, 1965* at which time various objections to the investigation were interposed. One of the points raised by counsel for Mr. Hickey as well as the counsel for other individuals was that the Commission's jurisdiction did not, as a matter of California law, extend to private individuals but was limited to public utilities.* The merits of that legal position are no longer in issue in this case as the Commis-

*Hickey had previously appeared on July 29, 1965, in compliance with the Commission's subpoena but was without counsel. He requested an opportunity to obtain counsel and the matter was continued to August 31, 1965.

*Their position was that because the Commission could not exercise jurisdiction over individuals such as Hickey, the appropriate forum for the resolution of the question as to the legitimacy of Mr. Hickey's stock rights was the Superior Court (a court of general jurisdiction in California). Counsel for Mr. Hickey advised the Commission at the hearing on August 31, 1965 that to the end that this question might be adjudicated in a forum capable of exercising jurisdiction over all the parties, an action had been filed in the Superior Court in and for the County of San Francisco. *Hickey v. Vallecito Water Co.*, No. 558551. The complaint sought to quiet Mr. Hickey's title to the stock. The Commission sought to have the proceeding restrained through a perogative writ proceeding in the California Supreme Court (*Public Utilities Commission v. Superior Court*, S.F. No. 22194) but the petition was denied on January 12, 1966. The Commission thereupon intervened in the Superior Court proceeding and sought injunctive relief against Mr. Hickey. Upon the denial of a perliminary injunction and the denial of the Commission's motion for a stay pending the proceedings pending before the Commission, a second perogative writ proceeding was undertaken in the California Supreme Court. (S.F. No. 22341). Again the Commission's petition was denied. The Superior Court action was subsequently stayed by the court pending the outcome of the proceedings before the Commission and has not yet gone forward.

sion chose not to adhere to the initial decision to designate Mr. Hickey and the others as parties respondent. Instead, the Hearing Examiner and the Senior Counsel for the Commission announced that Mr. Hickey was not a party to the proceedings; that the caption on the Order Instituting Investigation designating him as such was in error and should be disregarded; and that he was before the Commission solely as a witness:

(i) The Commission's Senior Counsel, Mr. Saroyan, stated:

> "It is true that Mr. Schumacher's name is in this Order Instituting Investigation as a respondent . . . along with other . . . nonutility people, two banks and Mr. Hickey. . . .
>
> "Now, as I say, the Order . . . is very broad but I will lay this matter to rest right here and now that the staff does not intend to assert any jurisdiction or attempt for the Commission to exert any jurisdiction over Mr. Schumacher.
>
> "MR. DOWNS [counsel for Hickey]: Mr. Saroyan, as I understand it, your statements as to Mr. Schumacher are also applicable to Mr. Hickey?
>
> "MR. SAROYAN: Yes, and it has been said two or three times at the last two days of hearings, a month ago, Mr. Downs." (R.T. Vol. 3, pp. 268-272, Hearing of August 31, 1965).

(ii) Previously, Mr. Saroyan had stated of Hickey:

"Mr. Examiner, this gentleman has been subpoenaed to appear as a witness *and nothing but a witness.*" (R.T. Vol. 2, pp. 239, 240, Hearing of July 29, 1965, emphasis added).

(iii) Subsequently, the Hearing Examiner had occasion to emphasize this point in response to the attorney for Mr. Schumacher who, like Mr. Hickey, had originally been named as a respondent:

"EXAMINER WARNER: But you weren't here at the original hearing and Mr. Hickey took the same position (*i.e.,* that the Public Utilities Commission lacked jurisdiction over him) and it was clear on the record that the Commission did not make him a respondent.

* * *

"He was subpoenaed as a citizen, a material witness, an alleged material witness, by the Commission the same as any other person. But he disclaimed any jurisdiction by the Commission and the Commission asserted none." (R.T. Vol. 3, p. 267, Hearing of August 31, 1965).

In reliance upon these, and upon similar statements (*e.g.,* R.T. Vol. 3, at pp. 294, 296, 303), Mr. Hickey did not find it necessary to press his claim that the Commission lacked jurisdiction over him. Advised that he was not a party, he did not participate in the proceedings, did not introduce evidence, and did not examine any witnesses.

The Commission entered its Interim Opinion on December 30, 1966 (Appendix B), in which it reiterated its previous finding that the shares purchased by Calfin were acquired and held in violation of section 852 because no Commission consent had been obtained. It further found that "Hickey did not acquire said shares in good faith" (Appendix B at p. 15 of the typed opinion and, thus, that the "issuance and transfer by Vallecito of its Stock Certificate No. 1024 to Hickey was null and void and of no effect" (*id.*, at p. 16 of the typed opinion). Its interim order was that Vallecito

> " . . . shall, within 10 days after the effective date hereof, reverse its stock transfer records and cancel the transfer to William J. Hickey of Stock Certificate No. 1024, covering 18,0003 shares of Vallecito's common stock." (*Id.*, at pp. 16-17 of typed opinion)

A timely petition for rehearing was filed on January 6, 1967 by Petitioner, objecting, *inter alia* to the Commission's purported exercise of jurisdiction with respect to the stock of Mr. Hickey. This was denied by the Commission on May 2, 1967. Petitioner thereupon filed, on June 1, 1967, a timely Petition for Writ of Review in the California Supreme Court, the only California tribunal with jurisdiction to review orders of the Public Utilities Commission. On December 13, 1967, the California Supreme Court denied the Petition.

REASONS FOR GRANTING THE WRIT

Petitioner has been ordered to cancel shares of stock purchased by Mr. Hickey at a cost of approximately $300,000. Mr. Hickey was not a party to the proceedings and had no reason or opportunity to exercise the rights of a party to introduce evidence and examine witnesses. The effect of the Commission's Order is to divest him of $300,000 worth of stock on the basis of facts found and legal conclusions drawn in a proceeding to which he was not a party and at which he was advised at the outset by the Commission that he was called solely as a witness and not as a party. This is an egregious violation of the right to a hearing which is the essence of the requirement that neither life, liberty or property shall be taken without due process of law.

1. A hearing at which Mr. Hickey would have been permitted to participate as a party would have been no mere formality. At issue was the critical question, on which Mr. Hickey's rights turn, of whether he was a bona fide purchaser of the stock who, therefore, would have been protected against the defects in the title caused by the allegedly illegal manner in which Calfin (the seller) had previously acquired stock.* We do not

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*In the California Supreme Court, the Commission argued that even if Hickey were a bona fide purchaser, he would not be protected by section 2470(b)(1) of the Corporations Code (quoted at p. 3, *supra*). We think that point is insubstantial as a matter of state law; for present purposes, it is sufficient to note that (a) there are no California authorities on the point; (b) Hickey's interpretation of §2470 has never been rejected in any proceeding to which he was a party; and (c) in fact, the Commission's order assumed that *were he a bona fide purchaser, he would be protected* and found as a fact that he was not a bona fide purchaser. It is that finding, made in a proceeding to which Hickey was not a party, that is in issue here.

propose to review the facts on which the Commission's Order was based or to indicate the evidence which Hickey could have introduced, had he been given the opportunity, to establish that he was a bona fide purchaser. It is enough to say that the facts are hotly disputed; yet Petitioner has been ordered to cancel Hickey's stock, for which he paid $300,000, on account of this order made in a proceeding to which Hickey was not a party.

2. Where "adjudicative facts" (Davis, Administrative Law Treatise [hereafter cited as "Davis"], § 7.02 (1958)) are in dispute, neither a court nor an administrative agency may act with respect to the interests of a person without affording him an opportunity to be heard. But as Professor Davis has observed, "Judicial opinions have not crystallized any basic principle to guide the determination of when the method of trial should be required, either by due process, or by interpretation of a statutory requirement of 'hearing' . . . ." (Id., at § 702). This case presents an excellent opportunity for this Court to clarify several important principles with respect to the most fundamental of rights enshrined in the Due Process Clause of the Fourteenth Amendment: the right to be heard.

(a) This Court has said time and again that due process requires that a hearing be afforded where an individual's property rights are subject to regulation or taking on the basis of judgments or determinations which are not general—that is, in Professor Davis'

terms, determinations of "adjudicative fact." "A hearing," this Court long ago said, "in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument, however brief, and, if need be, by proof, however informal." *Londoner v. Denver,* 210 U.S. 373, 386 (1908). The nature and extent of the hearing which must be afforded is not at issue in this case, for no hearing of any kind was afforded Mr. Hickey; the sole question is whether some kind of hearing must be given before action of the character ordered here may be taken. Where property is to be taken by order of the government, adjudicative facts must be resolved by a hearing to which the owner of the property is party. *E.g., Bragg v. Weaver,* 251 U.S. 57 (1919). That principle is not easily challenged, and a justification for the denial of that right to a hearing is difficult to perceive. Yet the taking of property without hearing was ordered in this case, in a disregard of the right to be heard, which suggests that a reaffirmation of this principle by this Court is urgently needed.

(b) The Commission suggested in the court below that it was improper for Petitioner to complain of the denial of due process which would result to Hickey if his stock were cancelled without an opportunity to be heard. We view this as an erroneous conception of the principles of "standing" which, in appropriate circumstances, preclude one party from asserting the rights of another. Here application of that principle is wholly inappropriate. Petitioner has been ordered by

the Commission to cancel the stock of Mr. Hickey; if, as we maintain, the order is unlawful in that Hickey never was given an opportunity to be heard, compliance by Petitioner with this order may subject it to civil liability.* As the California Supreme Court itself has recognized (see *Parish v. Civil Service Commission,* 66 Adv. Cal. 253, 258 (1967)), one compelled by the State to commit an unconstitutional act has standing to protest so that he will not be the unwilling instrument for the violation of the constitutional right of others. Moreover, the principle of "standing by necessity" is probably applicable here; as a technical matter, there may be no other means by which the rights of Mr. Hickey can be adjudicated. He was not a party to the proceedings before the Commission and apparently could not have sought review of the Commission's order in the California Supreme Court (or thereafter in this Court). The Commission continues to assert that, as a matter of California law, he will not be able to obtain relief in the courts of California to prevent the cancellation of his stock.* Where there is no other person who

*And, indeed, counsel for Mr. Hickey has advised Petitioner that an action for damages is contemplated in the event Hickey's stock is cancelled by Petitioner.

*The Commission takes the position that Section 1759 of the California Public Utilities Code forbids the Superior Courts from in any way interfering with the execution of its orders. That section provides:

> "No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interefere with the commission in the performance of its official duties, except that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases."

can assert the constitutional rights which have been violated, the customary requirements as to standing are relaxed to permit another person affected by the order to raise those questions. *Barrows v. Jackson,* 346, U.S. 249 (1953).

(c) But the question of standing may, in fact, be simply another way of phrasing the question of whether an order entered by an administrative body in a proceeding to which a person whose property will be taken or cancelled was not a party is valid. Putting the matter another way, to what extent does the principle of "indispensible parties" extend to administrative hearings? That question has never been satisfactorily resolved by this Court, and in fact remains unclear in the wake of several decisions of this Court which are difficult to reconcile.

In *N.L.R.B. v. Pennsylvania Greyhound Lines,* 303 U.S. 261 (1938), this Court upheld an order directing a company to withdraw recognition of a union found to be company-dominated in a proceeding to which the union was not a party. Sweeping language (see, e.g., 303 U.S., at 271) suggested that the test was whether the terms of the order ran against the union which was not made a party. But a decision rendered not long after confined the holding in the *Greyhound* case. In *Consolidated Edison Co. v. N.L.R.B,* 305 U.S. 197 (1938), the Court distinguished the *Greyhound* case on the ground that the union in *Consolidated Edison* was

not a company union, holding: "We think that the Brotherhood and its locals having valuable and beneficial interests in the contracts were entitled to notice and hearing before they could be set aside." (305 U.S., at 233). See also *N.L.R.B. v. Cowell Portland Cement Co.*, 108 F.2d 198 (9th Cir. 1939).

Subsequently, the decisions of this Court in *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350 (1940) and in *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146 (1941) indicated that in at least some circumstances, notice to the union need not be given. The issue in this precise factual setting may not again be presented because the National Labor Relations Board's present practice is to include as a party "any person named . . . as party to a contract in any proceeding under the act. and any labor organization alleged to be dominated, assisted, or supported in violation of section 8(a)(1) or 8(a)(2) of the act . . . ." NLRB Rules and Regulations, 29 C.F.R. § 102.8. But the constitutional issue remains very much unresolved in this and other settings.

An example concerns the rights of parties affected by awards and determinations of the National Railroad Adjustment Boards. A number of cases have considered the question of whether, where the interests of two employees are opposed to each other, they are all entitled to be heard. The Courts of Appeals have frequently held that a hearing must be afforded to all persons materially affected by the adjudication and

that orders made in proceedings in which one or more persons having such an interest were not given notice is void. *See, e.g., Nord v. Griffin,* 86 F.2d 481 (7th Cir. 1936), *cert. denied,* 300 U.S. 673 (1937); *Estes v. Union Terminal Co.,* 89 F.2d 768 (5th Cir. 1937); *Hunter v. A.T. & S.F. R. Co.,* 171 F.2d 594 (7th Cir. 1948), *cert. denied,* 337 U.S. 916 (1949); *Hunter v. A.T. & S.F. R. Co.,* 188 F.2d 294 (7th Cir.), *cert. denied,* 342 U.S. 819 (1951); *Allain v. Tummon* 212 F.2d 32 (7th Cir. 1954). The question then came to this Court in 1955 in *Whitehouse v. Illinois Central R. Co.,* 349 U.S. 366 (1955) but was not resolved in that case; as Professor Davis has observed, "The Court not only refused to settle the law but seemingly went out of its way to unsettle it." (Davis, at §8.11). The Court said in *Whitehouse*:

> "This [the notice and hearing question] remains a perplexing problem despite the substantial agreement among Courts of Appeals which have considered the question in holding that notice is required to other persons in varying situations . . . . In the context of other related provisions it is certainly not obvious that in a situation like that now before us notice need be given beyond the parties to the submission." (349 U.S., at 370).

Subsequent decisions of the Courts of Appeals have generally indicated that a decision made without notice to those who will be materially affected by it is not

enforceable (*e.g., Order of Railroad Telegraphers v. New Orleans, Tex. & M. Ry. Co.,* 229 F.2d 59 (8th Cir.) *cert. denied,* 350 U.S. 997 (1956)), but the issue is by no means resolved The present case offers an excellent opportunity for consideration of the point in a setting less encumbered by the statutory complexities inherent in the labor or railroad fields. Review should be granted to consider whether the right to a hearing in a matter involving the taking or cancellation of property rests on the technicality of whether the order specifically mentions the persons whose property is being taken.

3. The Commission has not as yet advanced any plausible justification for its assertion of the right to deprive Mr. Hickey of his stock without any hearing whatever. In the California Supreme Court, the Commission argued that the designation of Mr. Hickey as a respondent in the initial Order Instituting Investigation was "all the notice and opportunity to be heard required by due process of law." Moreover, the Commission suggested that there could be no complaint as Hickey was not *prevented* from attending the hearings. This entirely misses the point; Mr. Hickey objected to the Commission's initial attempt to exercise jurisdiction over him, being of the view that the Superior Court was the appropriate forum for restitution of these matters. The Commission made an about-face and announced that it was *not* exercising jurisdiction over Mr. Hickey; that he was called solely as a witness; and that its initial designation of him as a respondent was

erroneous and to be disregarded. That Hickey did not thereafter participate is hardly significant; the Commission is forbidden—as is any agency of the State—from luring one into a waiver of a fundamental Constitutional right. See *Raley v. Ohio,* 360 U.S. 423 (1959); *Stevens v. Marks,* 383 U.S. 234 (1966).*

CONCLUSION

Petitioner has been ordered to deprive Mr. Hickey of his stock worth approximately $300,000 following a hearing to which Mr. Hickey was not a party. A more flagrant denial of due process of law is difficult to conceive. In the complexities of the administrative process, the most basic of rights—the right to be heard—appears to have been utterly overlooked. Review is needed to declare anew that action adverse to the interests of an individual based, as was the case here, upon findings of adjudicative fact, cannot be had without an opportunity for a hearing. That opportunity was denied here, and only this Court can set matters right.

Respectfully submitted,

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*Hickey was not being coy in refusing to intervene voluntarily; that was consistent with his assertion that the Superior Court—not the Commission—was the appropriate forum for resolution of the question of his title to the stock. See note p. 7, *supra.* And the due process violation is not cured by the *possibility* that Hickey could have voluntarily intervened; if he was entitled to a hearing, the burden was on the Commission to make him a party. *Whitehouse v. Illinois Central R. Co.,* 349 U.S. 366, 372 (1955).